93

(2)

No. 07-1095

FILED
APR 29 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ORIENT MINERAL COMPANY and
WIL-BAO MINERAL CO., LTD.,

Petitioners,

v.

BANK OF CHINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

ARTHUR B. BERGER
RAY QUINNEY & NEBEKER P.C.
36 South State Street
Suite 1400
Salt Lake City, UT 84111
(801) 532-1500

CHRISTOPHER BRADY
Counsel of Record
ORLEE GOLDFELD
MICHAEL F. SMITH
BUTZEL LONG
380 Madison Avenue, 22nd Floor
New York, NY 10017
(212) 818-1110

Counsel for Respondent

215543

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether certiorari should be denied where the Petition seeks review of an interlocutory judgment of the Tenth Circuit but makes no attempt to show that review is necessary to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause," and where in any event, no such showing can be made.

II. Whether certiorari should be denied where there is no circuit conflict presented by the various circuits' application of the exceptions to foreign sovereign immunity set forth in 28 U.S.C. § 1605(a)(2), or *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), that would impact the outcome of this case.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Bank of China (the "Bank") is a corporation organized and existing under the laws of the People's Republic of China.

Until 2004, the Bank was wholly owned by the People's Republic of China. On or about August 26, 2004, the Chinese government converted the Bank into a joint stock company, and the Bank became Bank of China Limited.

Bank of China Limited's majority owner is Central SAFE Investment Limited. No publicly held company owns 10 percent or more of Bank of China Limited's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	1
I. Yue's Embezzlement	1
II. Deficiencies in Petitioners' Recitation of the Facts	4
III. Procedural Background	7
REASONS FOR DENYING THE PETITION	11
I. The Tenth Circuit's Interlocutory Judgment Provides No Basis for Invoking This Court's Certiorari Jurisdiction at This Time.	11
II. The Petition Offers Nothing That Warrants Review by This Court.	14

Contents

Page

A. Petitioners Merely Quibble with the Lower Courts' Factual Determinations and Accurate Application of the FSIA's Plain Text and This Court's Precedents Interpreting It. 14

B. The Four-Way Circuit Split Touted by Petitioners Is Illusory and, Even If It Exists, By Petitioners' Own Admission Predates *Nelson* and Is of No Meaningful Import to FSIA Jurisprudence. 15

C. The Tenth Circuit's Ruling Is a Correct Interpretation of the Statutory Text and This Court's Precedents. 22

CONCLUSION 25

TABLE OF APPENDICES

Page

Appendix A — Letter From Orient Mineral Co. To Bank Of China Dated May 16, 1996 ..... 1a

Appendix B — Wil-Bao Board Resolution Dated May 24, 1996 ..... 4a

Appendix C — Excerpts From District Court's Findings Of Fact And Conclusions Of Law, Filed January 26, 2005 ..... 7a

Appendix D — Amended Counterclaim Dated March 19, 2008 ..... 33a

Appendix E — Orient Mineral Company's Motion To Dismiss Amended Counterclaim, Filed April 2, 2008 ..... 42a

Appendix F — Individual Counterclaim Defendants' Motion To Dismiss Amended Counterclaim, Filed April 16, 2008 ..... 44a

TABLE OF CITED AUTHORITIES

Page

Cases

Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372 (1893) 1, 11, 13

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 22

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Ry. Co., 389 U.S. 327 (1967) 11, 13

Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982) 16

Globe Nuclear Servs. & Supply, Ltd. v. AO Techsnabexport, 376 F.3d 282 (4th Cir. 2004) 18, 21-22

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 11, 13

Kensington Int'l, Ltd. v. Itoua, 505 F.3d 147 (2d Cir. 2007) 18-20

Kirkham v. Societe Air France, 429 F.3d 288 (D.C. Cir. 2005) 20-22

Ministry of Supply, Cairo v. Universe Tankships, Inc., 708 F.2d 80 (2d Cir. 1983) .. 16

Cited Authorities

Page

Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352 (2007) 14-15

Saudi Arabia v. Nelson, 507 U.S. 349 (1993) .. *passim*

Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3d Cir. 1980) 16

Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands, 174 F.3d 969 (9th Cir. 1998) 19

Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp., 204 F.3d 384 (2d Cir. 2000) 20

Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195 (5th Cir. 1984) 16

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 22

Virginia Military Inst. v. United States, 508 U.S. 946 (1993) 11

Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887 (5th Cir. 1998) 22

Cited Authorities

Page

Statutes

28 U.S.C. § 1254(1) 1, 11

28 U.S.C. § 1603(d) 17

28 U.S.C. § 1603(e) 23-24

28 U.S.C. § 1604 ..... 7, 22

28 U.S.C. § 1605(a)(2) ..... *passim*

Rules

Supreme Court Rule 10 ..... 14, 15

Supreme Court Rule 29.6 ii

Other Authorities

Gressman, Geller et al., SUPREME COURT PRACTICE, § 4.18, pp. 280-81 (9th ed. 2007) 11

JURISDICTIONAL STATEMENT

While 28 U.S.C. § 1254(1) gives this Court discretion to exercise its certiorari jurisdiction over the Tenth Circuit's interlocutory judgment, Petitioners fail to show that this case presents the extraordinary circumstances typically required for such review. *See Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893). As is discussed in greater detail *infra* at pp. 11-13, this case in fact presents none of the indicia that warrant exercise of this Court's certiorari jurisdiction to review an interlocutory ruling.

STATEMENT OF THE CASE

I. Yue's Embezzlement

This case, part of which still is being litigated below, arises from the loss by Orient of its investment in the Wil-Bao gold mining venture in China, due to Petitioners' own negligence and mismanagement and due to the criminal misconduct of its director, Yue Xiaocun (a/k/a David Yue).

In 1996, Orient partnered with a Chinese company to form Wil-Bao Mineral Co., Ltd. ("Wil-Bao"), a joint venture whose purpose was to mill and mine gold in the Lingbao area in Henan Province, China. (Opinion, Pet. App. 4a). Orient obtained $3 million in funding for the venture from a wealthy investor, R. Ellsworth McKee. (Wil-Bao Board Resolution, 1a; Opinion, Pet. App. 5a).

On May 14, 1996, Yue informed the sub-branch of Respondent Bank of China ("the Bank") in Lingbao, China, that it would receive a wire transfer of $3 million

and requested an account number for the transfer. The Bank provided a letter giving wire-transfer instructions and a temporary account number to be used for the transfer. (District Court's Findings of Fact & Conclusions of Law (hereafter, "FF/CL"), 14a; Opinion, Pet. App. 7a). The Bank also stated that it would keep the funds safe pending the arrival of Orient's representative. (*Id.*). Yue faxed a copy of the Bank's letter to Art Wilson, Orient's Chairman of the Board, in Nevada. (FF/CL, 14a & n.18; Opinion, Pet. App. 3a, 8a). On May 21, 1996, McKee arranged for $3 million to be transferred from his bank in Georgia to the Bank's Lingbao sub-branch, China; it was routed through the Bank's New York branch. (FF/CL, 17a; Opinion, Pet. App. 9a).

On May 24, Wil-Bao's board of directors passed a resolution that, among other things, authorized Jones to approve any expenditure over $25,000. (Resolution, 5a; FF/CL, 17a; Opinion, Pet. App. 6a). The Wil-Bao board resolution did not contain any reference to the Bank or to disbursements or disposition of funds from any account at the Bank, nor did it bear any indicia of corporate authority. (Resolution, 4a-5a; FF/CL, 26a-27a).

Early in the morning of May 27, 1996, the Lingbao sub-branch received the $3-million transfer and placed those funds in a temporary account. (FF/CL, 35a-36a). Later that morning, four representatives of Orient and Wil-Bao, including Preston Jones, Art Wilson, F. Thomas Eck III, and David Yue, came to the Bank to open U.S. dollar and local currency accounts for Wil-Bao. The four representatives met with officers of the Bank's sub-branch. (*Id.*, 36a; Opinion, Pet. App. 9a-10a). The Bank's officers did not speak or understand English, and Jones, Eck, and Wilson did not speak or understand Chinese. Yue, who was

a director of both Petitioners, acted as the sole translator during the meeting, at Petitioners' request and desire. (FF/CL, 18a-19a; Opinion, Pet. App. 10a).

Petitioners' representatives presented the Bank with a letter from Orient dated May 16, 1996, and with a Resolution by Orient's Board of Directors. The Resolution stated that Jones was to have sole and exclusive authority concerning disposition of the $3 million. (Orient Board Resolution, 1a-2a; FF/CL, 16a; Opinion, Pet. App. 8a-9a). It also provided that Orient would indemnify and hold harmless the Bank "from all claims or liabilities of any kind whatsoever," as long as the Bank followed Jones's instructions. (Resolution, 1a; FF/CL, 15a-16a). These were formal documents bearing corporate seals. (FF/CL, 16a; Opinion, Pet. App. 10a). Given their formal appearance, a bank clerk translated the written documents. (Opinion, Pet. App. 10a). Yue confirmed that the documents designated Jones as the authorized person to dispose of the funds. The May 24, 1996 Wil-Bao Board Resolution was not provided to the Bank during the May 27 meeting. (Wil-Bao Board Resolution, 4a-5a; FF/CL, 18a; Opinion, Pet. App. 9a).

Based on the written translation and what Yue told the Bank officers, the Bank prepared Wil-Bao's account opening documentation for a U.S. dollar account and a local currency account, as well as a slip to transfer the $3 million from the temporary account into Wil-Bao's U.S. dollar account. (Opinion, Pet. App. 11a). Jones, as Orient's designated representative, signed the transfer slip. (*Id.*). The account documentation included three required signatories, none of whom was Jones. No limitations were placed on the accounts. (FF/CL, 27a; Opinion, Pet. App. 11a).

During the following months, Wil-Bao directed the Bank to make transfers of funds from the Wil-Bao accounts, without Jones's knowledge or authorization. (Opinion, Pet. App. 13a). These transfers included three transfers from Wil-Bao's U.S. dollar account to the United States, including the transfer at issue in this case, for $400,000 to defendant Saren Gaowa in Utah. (FF/CL, 19a, 31a-32a; Opinion, Pet. App. 13a). The District Court found that the Bank acted properly, in accordance with the request of its customer, Wil-Bao, in processing the transfer requests, and that the transfer slips bore the required three seals. (FF/CL, 31a-32a). The three transfers were routed from the Bank's Lingbao sub-branch to the designated bank in the United States and through the Bank's New York branch. (Opinion, Pet. App. 39a).

Over time, the funds in Wil-Bao's accounts were depleted, and the Wil-Bao joint venture failed. (Opinion, Pet. App. 13a-15a). David Yue was arrested in China, tried, and found guilty of embezzlement. (*Id.*, Pet. App. 15a).

II. Deficiencies in Petitioners' Recitation of the Facts

Petitioners' Statement of the Case misstates numerous important facts – in many instances, in a manner directly contrary to findings made by the District Court and affirmed by the Tenth Circuit. By way of example:

- Petitioners intimate that the Bank sent the May 14, 1996 letter to Orient in Nevada. (Pet. 4). In fact, as the lower

courts both found, the Bank provided this letter (written in Chinese) to Yue in *China*; Yue then transmitted the letter to Art Wilson, Orient Mineral's chairman, in Nevada. (FF/CL, 14a & n.18; Opinion, Pet. App. 39a). The distinction is critical, since the Tenth Circuit specifically found that the relevant inquiry was whether that act taken outside the United States had a "direct effect" within this country – and the court held that it did not. (Opinion, Pet. App. 39a).

- The Petition incorrectly states that "Orient wired $3 million to [the Bank's] New York branch, for transmittal to its branch in Lingbao, China." (Pet. 5). In fact, Orient's investor, R. Ellsworth McKee, initiated a wire transfer from his account in Georgia to the Lingbao sub-branch in China; unbeknownst to McKee, Wachovia happened to route the funds through the Bank's New York branch. But the transfer did not involve $3 million wired "to the New York branch" – both the District Court and Tenth Circuit correctly found that that the wire transfer was to the sub-branch in Lingbao. (FF/CL, 17a; Opinion, Pet. App. 9a).

- Petitioners incorrectly state that Jones at the May 27, 1996 meeting submitted the Wil-Bao board resolution concerning his authority to approve

disbursements over $25,000. (Pet. 5). In fact, the District Court specifically found that the Wil-Bao board resolution, which concerned *expenditures* over $25,000 and did not refer to the Bank in any way, was provided to the Bank on May 29, 1996 – two days after the Wil-Bao accounts were opened. (FF/CL, 25a). The Tenth Circuit affirmed the District Court's holding that the board resolution and its $25,000 limitation did not form part of Wil-Bao's contract with the Bank. (FF/CL, 31a-32a; Opinion, Pet. App. 47a-48a).

- The Petition incorrectly states that Yue sent $400,000 to the Bank's New York branch. (Pet. 5). In fact, Yue initiated a wire transfer on behalf of Wil-Bao that included its three required seals. This transfer was to Saren Gaowa's bank account in Utah, and the funds were routed through the Bank's New York branch. (FF/CL, 19a). It was this transfer alone that the District Court found was a commercial activity overseas that caused a direct effect in the United States under the third prong of the commercial activity exception (and which, it ultimately held, did not constitute a breach of contract). (FF/CL, 31a-32a).

III. Procedural Background

Orient filed this action against the Bank in 1998, alleging breach of contract and a variety of tort claims, and seeking to recover the $3 million McKee invested, as well as lost profits anticipated from the joint venture. In May 2001, Wil-Bao joined as a co-plaintiff. At the time the suit was filed, the Bank was a foreign corporation owned by the government of China, and it is undisputed that under the Foreign Sovereign Immunities Act ("FSIA"), it was immune from the subject-matter and personal jurisdiction of U.S. courts unless one of the exceptions to FSIA immunity applied. *See* 28 U.S.C. § 1604.

Soon after the action was filed, the Bank moved for judgment on the pleadings based on lack of subject-matter and personal jurisdiction. The District Court ruled that there was probable jurisdiction under the "direct effect" (third) clause of the commercial activity exception to the FSIA, 28 U.S.C. § 1605(a)(2), limited solely to the single $400,000 transfer from Wil-Bao's account to Gaowa in Utah. (Memorandum Opinion and Order, Pet. App. 114a-133a). The Bank appealed the finding of probable jurisdiction; Orient – which at that point was the only plaintiff – did not appeal the District Court's limitation of jurisdiction.

The Tenth Circuit directed Orient to show that it had made valid service on the Bank. When Orient failed to do so, the court remanded the case with directions that the District Court vacate that part of its ruling finding probable jurisdiction and resolve the service-of-process issue. (Order and Judgment, Pet. App. 106a-

113a). The parties continued to litigate, and Petitioners in 2004 sought a writ of mandamus to remove the trial judge, but their request was denied. (Order,, Pet. App. 103a-105a).

Following a 13-day bench trial, the District Court in early 2005 entered its 235-page Findings of Fact and Conclusions of Law, including its rulings on various pending motions. (FF/CL, excerpts at 7a-32a). The District Court found that it had jurisdiction only as to Petitioners' claims relating to the $400,000 transfer, for which the third prong of the FSIA's commercial activity exception provided jurisdiction, and that none of Petitioners' other claims fell within any exception. (FF/CL, 28a-32a). As to Petitioners' claims relating to the $400,000 transfer, the District Court dismissed them on the merits. The following day, the District Court entered its Judgment and Order of Dismissal, Judgment, District Court R. 339, and later entered an order dismissing the Bank's counterclaim for indemnification for attorneys' fees. Order, District Court R. 363.

The parties each appealed portions of the District Court's rulings. Petitioners argued that all three clauses of 28 U.S.C. § 1605(a)(2) provided jurisdiction over each of their claims, asserted that the District Court made clear errors in its findings of fact and asked the Tenth Circuit to make its own findings and remand the case to a different judge. The Bank cross-appealed, asserting that the FSIA did not provide jurisdiction over Petitioners' claims relating to the $400,000 transfer. It also appealed the District Court's dismissal of its counterclaim for indemnification.

The Tenth Circuit affirmed the dismissal of Petitioners' claims. (Opinion, Pet. App. 1a-58a). It found that the FSIA did not give the District Court jurisdiction over the claims (other than the ones relating to the $400,000 transfer) since they were not based upon either commercial activity by the Bank in the United States, or upon an act within the United States in connection with the Bank's commercial activity elsewhere. (*Id.*, Pet. App. 20a-42a). With regard to the claims relating to the $400,000 transfer, the Tenth Circuit affirmed their dismissal on the merits. (*Id.*, Pet. App. 42a-53a). Significantly, the Tenth Circuit rejected Petitioners' challenge to the District Court's factual findings, holding that "the trial record fully supports the district court's determination." (Opinion, Pet. App. 46a).

The Tenth Circuit also reversed the District Court's dismissal of the Bank's counterclaim for indemnification and remanded with specific instructions that the District Court consider the merits of that claim:

> It is far from clear whether Orient Mineral's resolution of May 16, 1996, agreeing to hold the bank "harmless from all claims or liabilities of any kind," includes the Bank's expenditure for its own attorneys' fees. However, the district court never reached the merits of the matter. Instead, the district court erroneously rejected the claim, believing that its award to the Bank of its costs gave the Bank all the relief it was seeking in the counterclaim. We do not intimate anything at this time about the merits of the Bank's claim for attorneys'

fees, but that matter should be considered in the first instance by the district court. (Opinion, Pet. App. 53a-57a).[1]

Following issuance of the Tenth Circuit's Opinion, the case continues to be litigated in the District Court. The Bank in March 2008 filed an Amended Counterclaim for Indemnification, and as of this writing, Orient and the members of its board of directors have pending motions to dismiss that counterclaim. (Amended Counterclaim, 33a; Orient Mineral Company's 4/2/08 Motion to Dismiss, 41a; Individual Counterclaim Defendants' 4/16/08 Motion to Dismiss, 44a).

Petitioners now seek this Court's review of part of the Tenth Circuit's Opinion.

---

[1] Given that it had affirmed the District Court's dismissal of all of Petitioners' claims, the Tenth Circuit declined to address Petitioners' request that the case be remanded to a new judge. (Opinion, Pet. App. 53a). However, while its ruling reviving the Bank's counterclaim necessarily would result in further proceedings on remand, the Tenth Circuit specifically noted that Petitioners' had failed to make the same request for a new judge on remand in Appeal No. 05-4220, the Bank's appeal as to its counterclaim. (Opinion, Pet. App. 57a). Accordingly, proceedings on remand are again before Judge Jenkins, who is intimately familiar with the extensive facts and legal background of the case.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit's Interlocutory Judgment Provides No Basis for Invoking This Court's Certiorari Jurisdiction at This Time.

While 28 U.S.C. § 1254(1) gives this Court discretion to review non-final judgments of the Federal circuit courts, the Court generally awaits final judgment before exercising its certiorari jurisdiction. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari), *citing Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893), and *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Ry. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *see also* Gressman, Geller et al., SUPREME COURT PRACTICE, § 4.18, pp. 280-81 (9th ed. 2007). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (citations omitted) (lack of finality in a lower-court decree "of itself alone furnished sufficient ground for the denial of the application").

The Tenth Circuit's Opinion is undeniably interlocutory. After the District Court's rulings collectively disposed of all of Petitioners' claims and the Bank's counterclaim, the Tenth Circuit affirmed the former decisions, but reversed the dismissal of the Bank's counterclaim for indemnification and remanded the case for further proceedings. (Opinion, Pet. App.

57a-58a). The Tenth Circuit discussed in detail the issues the District Court is to resolve on remand:

> It is far from clear whether Orient Mineral's resolution of May 16, 1996, agreeing to hold the bank "harmless from all claims or liabilities of any kind," includes the Bank's expenditure for its own attorneys' fees. However, the district court never reached the merits of the matter. Instead, the district court erroneously rejected the claim, believing that its award to the Bank of its costs gave the Bank all the relief it was seeking in the counterclaim. We do not intimate anything at this time about the merits of the Bank's claim for attorneys' fees, but that matter should be considered in the first instance by the district court. (Opinion, Pet. App. 53a-57a).

Thus, while the District Court's ruling was final in terms of disposing of all the claims of all the parties, the Tenth Circuit's opinion is decidedly *non*-final and is not ripe for review. Indeed, the matter currently is being litigated below. The Bank in March 2008 filed its Amended Counterclaim for Indemnification, seeking its costs of defense in this decade-old litigation that by now are in excess of $900,000. (Amended Counterclaim, 33a). Petitioners have filed various motions to dismiss the counterclaim that remain pending as of this writing. (Orient Mineral Company's 4/2/08 Motion to Dismiss, 41a; Individual Counter-Claim Defendants' 4/16/08 Motion to Dismiss, 44a). In short, Petitioners seek review by this Court of a matter they are actively litigating in the District Court.

This is the identical context in which *Brotherhood of Locomotive Firemen & Enginemen* came to this Court. In that case, the District Court entered final remedies in the form of injunctive relief and contempt orders, but the Court of Appeals, after reviewing, remanded for further analysis of various contempt-related issues. Rejecting the petition for certiorari, this Court noted that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." 389 U.S. at 328, *citing Hamilton-Brown Shoe Co.*, 240 U.S. at 257-58. The same can be said here, and, as was the case with *Brotherhood of Locomotive Firemen & Enginemen*, this matter is not ripe for this Court's review.

This Court long has required a heightened showing before granting certiorari for an interlocutory judgment, requiring that immediate review be "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co.*, 148 U.S. at 384. Petitioners, however, have failed even to acknowledge that the Tenth Circuit's judgment is interlocutory, much less discussed why review is needed to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause." Doubtless, that is because they cannot meet that standard. This case is a decade old, and Petitioners can point to no "extraordinary inconvenience," nor any other factor sufficient to require immediate review by this Court.

II. The Petition Offers Nothing That Warrants Review by This Court.

A. Petitioners Merely Quibble with the Lower Courts' Factual Determinations and Accurate Application of the FSIA's Plain Text and This Court's Precedents Interpreting It.

At its core, the Petition seeks simply to have this Court replicate the extensive analysis conducted by both lower courts of the voluminous factual record from the 13-day bench trial. For instance, Petitioners complain that the District Court "disregarded" certain facts in the course of its 235-page findings and opinion. (Pet. 9). But Petitioners fully aired their challenge to the District Court's factual findings in the Tenth Circuit, which rejected them out of hand "because the trial record fully supports the district court's determination." (Opinion, Pet. App. 46a). Even had factual errors occurred below – which they did not – they plainly do not warrant the grant of certiorari under Rule 10.[2]

Likewise, the Petition asserts that the Tenth Circuit misapplied properly stated legal rules. Petitioners complain about the Tenth Circuit's "literal approach" to the FSIA (Pet. 17-27), without acknowledging that, in interpreting the FSIA (as with any statute), this Court "begin[s], as always, with the text of the statute." *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2356 (2007) (citation

[2] The District Court did not "disregard" any "determinative" facts – the "disregarded" facts that Petitioners cite (Pet. 9) had nothing to do with this case.

omitted). Petitioners then survey the varying circuits' pre-*Nelson* analyses of the first clause of 28 U.S.C. § 1605(a)(2) and argue that, while the Tenth Circuit correctly cited the applicable rule from *Nelson*, it misapplied that rule. (Pet. 20-21). Again, even assuming that Petitioners' charge were correct, which it is not, the mere misapplication of a properly stated rule of law does not justify the grant of certiorari. Rule 10.

Petitioners in the end offer nothing beyond their unhappiness with the Tenth Circuit's ruling. But a litigant's mere displeasure falls far short of the "compelling reasons" required to justify the grant of certiorari.

B. The Four-Way Circuit Split Touted by Petitioners Is Illusory and, Even If It Exists, By Petitioners' Own Admission Predates *Nelson* and Is of No Meaningful Import to FSIA Jurisprudence.

Petitioners assert a four-way conflict among the circuits in interpreting the first clause of the commercial-activity exception, 28 U.S.C. § 1605(a)(2). Specifically, they argue that the Tenth Circuit improperly held that the wrongful act by the foreign state has to have occurred in the United States in order to satisfy the first clause. (Pet. 20). But no such conflict exists, and their position is based in large part on their own misinterpretation of the applicable law, and of the facts as found and affirmed by the lower courts.

1. The Petition asserts repeatedly and prominently that the Tenth Circuit decision is part of a "widening

conflict" among the circuits (Pet. i) (Questions Presented), and **"completes a four-way circuit split,"** (Pet. 17) (point heading) (bold in original). But elsewhere it admits that the purported conflict in fact predates *Nelson*. (Pet. 19). The cases on which Petitioners base their claim of circuit conflict clearly bear that out. (Pet. 17-21, *citing, inter alia, Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80 (2d Cir. 1983), *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980), *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984) and *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982)). Even if the differences among those decisions amounted to genuine distinctions in interpreting the first clause of 28 U.S.C. § 1605(a)(2), which they do not, Petitioners offer no explanation of how another ruling from this Court will resolve a circuit conflict that *Nelson* apparently failed to resolve.

2. In point of fact, the Tenth Circuit faithfully applied *Nelson*. Contrary to Petitioners' assertion that the question is whether the Bank's entire "course of conduct . . . cumulatively had substantial contact with the United States," (Pet. 23), *Nelson* set the analytical starting point as "identifying the *particular* conduct on which the [plaintiffs'] action is 'based' for purposes of the Act." 507 U.S. at 356-57 (citations omitted) (emphasis added). *Nelson* went on to hold that, in determining which conduct forms the basis for plaintiff's claim, the statutory phrase "based upon" "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357 (citations omitted).

The Tenth Circuit conducted that exact analysis in finding that none of Petitioners' claims are "based upon" the Bank's commercial activity in the United States for purposes of the first clause. (Opinion, Pet. App. 24a-31a). Petitioners try to evade that language by claiming that it "addressed only whether the activity was sovereign," (Pet. 23), but that misreads *Nelson*. Though *Nelson* ultimately found that the specific conduct by Saudi Arabia on which plaintiff's claim was based – exercise of its police power through which it allegedly tortured plaintiff – was sovereign, and not commercial, nothing in *Nelson* restricts that language in the manner Petitioners assert. To the contrary, this Court specifically made those statements in the context of defining the term "commercial activity" as used in the FSIA:

> If [28 U.S.C. § 1603(d)] is a definition, it is one distinguished only by its diffidence; as we observed in our most recent case on the subject, it "leaves the critical term 'commercial' largely undefined. . . . We do not, however, have the option to throw up our hands. The term has to be given some interpretation, and congressional diffidence necessarily results in judicial responsibility to determine what a "commercial activity" is for purposes of the Act. [507 U.S. at 358-59 (internal citations omitted)].

Tellingly, Petitioners criticize the Tenth Circuit for failing to follow the Fourth Circuit's analysis in *Nelson*, (Pet. 23-25) – a ruling that this Court reversed. 507 U.S. at 363. They also cite other circuits that, like the Tenth

Circuit, have faithfully applied *Nelson*. (Pet. 23-25, *citing Globe Nuclear Servs. & Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282 (4th Cir. 2004) and *Kensington Int'l, Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007)). This demonstrates plainly that *Nelson* is being properly applied by the lower courts, including the Tenth Circuit, and does not need to be revisited.

3. To the extent Petitioners assert a circuit conflict between the Tenth Circuit's ruling and other post-*Nelson* cases, their assertion is internally inconsistent and incorrect. Petitioners cite the Tenth Circuit's Opinion and the Second Circuit's ruling in *Kensington Int'l* as examples of instances in which courts "routinely depart from the language and intent of the Act. . . ." (Pet. 15). Elsewhere, however, they portray the Tenth Circuit's ruling as "the first time that any court of appeals has applied a 'literal' interpretation to clause one of the exception, to deny jurisdiction over the action of a U.S. citizen [*sic*] based upon commercial activity of a foreign state which had substantial contact with the United States." (Pet. 12). Petitioners cannot have it both ways, and in arguing that certiorari is warranted both because the Tenth Circuit applied the first clause literally, and because it departed from the statutory language, Petitioners' position is fundamentally inconsistent.

It also is incorrect, since there is no post-*Nelson* circuit split on any issue germane to the one presented by this case. The various cases that Petitioners cite as

establishing a circuit conflict either are factually inapposite or actually support the Bank:

- In *Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands*, 174 F.3d 969, 971, 973-74 (9th Cir. 1998) (Pet. 20), the Ninth Circuit held that the foreign state engaged in commercial activity in the United States by entering into an agreement in the United States; the alleged wrongful act was the breach of that agreement. Here, in contrast, the Tenth Circuit found that certain actions of the Bank were taken *in China*, not in the United States, and that the Bank's lone action that could be deemed to constitute carrying on commercial activity here – its operation of a branch in New York City – was not an activity upon which Petitioners' claims were based. (Opinion, Pet. App. 27a-31a). *Theo. H. Davies & Co.* does not conflict with the Tenth Circuit's ruling.

- Petitioners portray *Kensington Int'l* as one of four variants among the circuits in interpreting *Nelson*, (Pet. 19-21), but it in fact constitutes a straightforward application of *Nelson*. In the passage on which Petitioners rely (Pet. 20), the Second Circuit merely held that in construing whether plaintiff's action is "based upon" the foreign state's commercial activity carried on in the United States, something more than "but

for" causation is required – the "degree of closeness" between the commercial activity and the gravamen of plaintiff's complaint must be considered. 505 F.3d at 155, *citing Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000). Rejecting plaintiff's argument that it met its burden under the first clause because oil was shipped to the United States and payments made to a New York bank, the Second Circuit noted that those activities, while concededly in the United States, were not the basis of plaintiff's claim. Rather, the gravamen of plaintiff's claim was that the foreign state tried to thwart plaintiff's ability to collect a debt by entering into a prepayment agreement with a bank, which was not commercial activity in the United States. The same holds true here: the Bank concedes that its maintenance of a New York branch constitutes commercial activity, but that activity has nothing to do with the gravamen of Petitioners' claims. *Kensington Int'l* supports the Bank.

- In *Kirkham v. Societe Air France*, 429 F.3d 288, 292 (D.C. Cir. 2005) (Pet. 26), defendant airline sold a plane ticket to plaintiff in the United States. Applying *Nelson*, the D.C. Circuit held that because that commercial activity was necessary to

plaintiff's tort claim, the claim was "based upon" that commercial activity, and jurisdiction was appropriate. *Id.* Likewise, in *Globe Nuclear Servs.*, the Fourth Circuit followed *Nelson* in "precisely identify[ing] the conduct by [the foreign state] upon which [plaintiff's] lawsuit is based." 376 F.3d at 285. The court determined that plaintiff's claim was based upon the foreign state's entry into a contract to supply plaintiff with uranium hexafluoride and the foreign state's subsequent repudiation of that contract: the contract called for the foreign state to transfer title to uranium hexafluoride that was located within the United States, and the foreign state served its notice of termination of the contract upon the plaintiff in Maryland. Therefore, the foreign state's conduct had "substantial contact" with the United States and fit within the first clause of the commercial activity exception.

Both *Kirkham* and *Globe Nuclear Servs.* show that, notwithstanding Petitioners' alarmism, court decisions under the FSIA are not depriving citizens of "normal legal redress against foreign states," contrary to the Act's purposes. (Pet. 34 (*citing* House hearings on FSIA)). To the contrary, the courts are faithfully applying the Act, and allowing suits to proceed where the specific conduct on which the

gravamen of plaintiff's claim is based meets the statutory test. Here, it plainly does not.

- Finally, *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998) (Pet. 21), is inapposite because the Fifth Circuit in that case never reached the issue of whether the Bank's conduct satisfied the first clause. Petitioners' argument that the Fifth Circuit "nearly" applied a "literal standard" in contravention of *Nelson*'s teachings, is misplaced.

C. The Tenth Circuit's Ruling Is a Correct Interpretation of the Statutory Text and This Court's Precedents.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). Under the FSIA, a foreign state is presumptively immune from the jurisdiction of the United States courts, and unless a specified exception applies, a Federal court lacks subject-matter jurisdiction over a claim against it. *Nelson*, 507 U.S. at 355; *see also Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983); 28 U.S.C. § 1604. Petitioners argued that all three clauses of the commercial activity exception provide jurisdiction, but the Tenth Circuit held that, with one exception, they did not. (Opinion, Pet. App. 1a). Petitioners fail to demonstrate any error in that ruling.

Petitioners err in arguing that the lower courts ignored the "substantial contact" component of 28 U.S.C. § 1603(e), which defines "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States." Petitioners assert that the "'substantial contact' standard contained in 28 U.S.C. § 1603(e) has never been interpreted by this Court," and that as a result, "no consistent test has emerged for applying this fundamental standard." (Pet. 14). But they fail to note that this case would not give this Court a vehicle with which to interpret that statutory provision.

Consistent with both the plain statutory language and common sense, the Tenth Circuit found that nearly all of the acts complained of by Petitioners – the Bank's provision of the May 14, 1996 letter to Yue in China and its subsequent receipt of the two Orient Mineral documents in China; its wiring of funds through its New York branch or its transfer of $400,000 in Wil-Bao funds to the bank in Utah – did not involve commercial activity in the United States upon which Petitioners' claims were based. (Opinion, Pet. App. 27a-31a). As such, the "substantial contact" component of 28 U.S.C. § 1603(e) is irrelevant: because a claim must be "*based upon* [1] commercial activity carried on in the United States by the foreign state" (emphasis added), which in turn requires *both* "commercial activity carried on by such state" and that that activity have a "substantial contact" with the United States, the fact that Petitioners' claims are based upon commercial activity in China is dispositive. No amount of judicial parsing or

interpretation of the "substantial contact" clause of 28 U.S.C. § 1603(e) would change the outcome in any way.[3]

The Tenth Circuit also correctly held that Petitioners cannot satisfy the second and third clauses of the commercial activity exception, which extend jurisdiction based upon "an act performed in the United States in connection with commercial activity of the foreign state elsewhere" or an action outside the United States "in connection with a commercial activity of the foreign state elsewhere [which] causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). (Pet. App. 32a-42a). As the court properly noted, Petitioners did not satisfy this requirement because their case was not based upon any act of the Bank in the United States. (*Id.*). At most, the Bank's transmission of the $400,000 from China to Utah was "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act cause[d] a direct effect in the United States," thereby satisfying the third clause – but Petitioners' other allegations do not meet the statutory test.

Petitioners would have the FSIA analysis begin and end with "opening the courthouse doors" to parties such

---

[3] Contrary to Petitioners' claim that the Bank breached its contract with them by not placing a restriction on the Wil-Bao account, (Pet. 24), the District Court concluded that there was no $25,000 restriction placed on the Wil-Bao account and that therefore, the Bank did not breach its contract with Wil-Bao. (FF/CL, 30a-32a). The District Court also found that the Bank did not breach its contract with Orient. (*Id.*, 29a-30a). The Tenth Circuit affirmed these determinations. (Opinion, Pet. App. 46a).

as themselves. (Pet. 31). Instead, the analysis should focus on the text of the 28 U.S.C. § 1605(a)(2) as it applies to the detailed factual findings made by the District Court. The Tenth Circuit correctly found that, with one exception, the statutory text does not provide jurisdiction over Petitioners' claims against the Bank.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHRISTOPHER BRADY
Counsel of Record
ORLEE GOLDFELD
MICHAEL F. SMITH
BUTZEL LONG
380 Madison Avenue, 22nd Floor
New York, NY 10017
(212) 818-1110

ARTHUR B. BERGER
RAY QUINNEY & NEBEKER P.C.
36 South State Street
Suite 1400
Salt Lake City, UT 84111
(801) 532-1500

Counsel for Respondent

APPENDIX

APPENDIX A — LETTER FROM ORIENT MINERAL CO. TO BANK OF CHINA DATED MAY 16, 1996

ORIENT MINERAL CO.
P.O. Box 20460
Carson City, Nevada 89721
Phone: 702-882-0700/Fax: 702-882-0790

May 16, 1996

Bank of China
Lingbao City of HeNan Province
P.R.C.

Gentlemen:

Enclosed you will find a resolution of Orient Mineral Company, a corporation duly formed and organized under the laws of the State of Nevada, U.S.A., authorizing Preston Jones, a member of the Board of Directors, as the sole and exclusive agent of Orient Mineral Company, to approve, direct, or otherwise designate the funds on deposit with you pursuant to wire transfer from R. Ellsworth McKee and deposited in your account for the benefit of Orient Mineral Co. and the Wilbao Joint Venture.

Please be advised that by this letter the said resolution is confirmed and ratified in all respects and that Preston Jones shall have full and complete authority with regard to the disposition of said funds.

Sincerely yours,

s/ F. Thomas Eck, III
F. THOMAS ECK, III
President, Orient Mineral Co.

Appendix A

RESOLUTION

Resolution of Board of Directors of Orient Mineral Co. as Orient Mineral Co. is presently in the process of receiving approximately $3,000,000, U.S., to be deposited into the Bank of China, Lingbao Branch of HeNan Province, and

WHEREAS, it is the desire of the Board of Directors that the disposition of said funds be controlled by one person, and

WHEREAS, it is the condition of the receipt of said funds that said person shall be Preston Jones, a member of the Board of Directors;

NOW, THEREFORE, BE IT RESOLVED that Preston Jones shall be the sole and exclusive person to act on behalf of Orient Mineral Co. with respect to the disposition of all funds deposited in the Bank of China, Lingbao Branch of HeNan Province; and

BE IT FURTHER RESOLVED that the Board of Directors confirms and ratifies all such dispositions by said Preston Jones; and

BE IT FURTHER RESOLVED that the Board of Directors and Orient Mineral Co. shall hold the Bank of China harmless from all claims or liabilities of any kind whatsoever, provided the directions of Preston Jones are followed by said Bank of China.

Appendix A

Dated this 16th day of May, 1996.

s/ F. Thomas Eck, III
F. THOMAS ECK, III
President, Orient Mineral Co.

ATTEST:

s/ Pauline Smith
Secretary (ACTING)

[CORPORATE SEAL]

APPENDIX B — WIL-BAO BOARD RESOLUTION DATED MAY 24, 1996

SPECIAL MEETING OF THE BOARD OF DIRECTORS WIL 'BAO MINERAL LIMITED LIABILITY COMPANY MAY 24, 1996

BY A UNANIMOUS VOTE OF THE BOARD OF DIRECTORS OF THE HENAN WIL 'BAO MINERAL LIMITED LIABILITY COMPANY JOINT VENTURE, AN EMERGENCY MEETING WAS HELD ON MAY 24, 1996. THE FOLLOWING RESOLUTION WAS ADOPTED:

BE IT RESOLVED: THAT THE BOARD OF DIRECTORS HAS ACCEPTED FUNDING FROM MR. ELLSWORTH MCKEE IN THE AMOUNT OF $2.9 MILLION US DOLLARS AND HAS AGREED THAT REPAYMENT OF THE LOAN BE MADE DIRECTLY TO ELLSWORTH MCKEE ACCORDING TO THE FOLLOWING CONDITIONS:

A. ONE HUNDRED PER CENT (100%) OF THE DISTRIBUTABLE PROFITS WILL BE APPLIED TO THE REPAYMENT OF THE LOAN UNTIL SUCH TIME AS THE LOAN INCLUDING ACCRUED INTEREST IS PAID IN FULL AND

B. AFTER SUCH TIME THE LOAN IS REPAID, MR. MCKEE WILL RECEIVE AS A COMMISSION THE AMOUNT OF

Appendix B

$333,333.33 US DOLLARS PER YEAR FOR THREE CONSECUTIVE YEARS, IS REPAID.

BE IT FURTHER RESOLVED THAT UNTIL ALL SAID SUMS ARE REPAID IN FULL PRESTON JONES SHALL BE APPOINTED AS THE DIRECTOR OF WIL 'BAO RESPONSIBLE FOR THE MANAGEMENT OF THE FINANCIAL AFFAIRS OF WIL 'BAO WITH SOLE AUTHORITY TO APPROVE ANY EXPENDITURES OF WIL 'BAO IN EXCESS OF $25,000 US DOLLARS.

BE IT FURTHER RESOLVED THAT ALL PRESENT MEMBERS OF THE BOARD OF DIRECTORS SHALL REMAIN APPOINTED FOR A PERIOD OF NOT LESS THAN ONE YEAR FROM THIS DATE UNLESS SAID BOARD MEMBER RESIGNS OR IS REMOVED FOR CAUSE.

THERE BEING NO FURTHER BUSINESS TO DISCUSS, THE MEETING WAS ADJOURNED.

DATED MAY 24, 1996, LING BAO CITY, PRC

s/ Li Jan Qiang
LI JAN QIANG,
VICE CHAIRMAN

s/ Zhang Fang Xing
ZHANG FANG XING,
DIRECTOR AND VICE
GENERAL MANAGER

Appendix B

s/ Zhao Zhixiang
ZHAO ZHIXIANG,
DIRECTOR AND JIAOCUN
TOWN MAYOR

s/ Art Wilson
ART WILSON, CHAIRMAN

s/ Xiaoqun Yue
XIAOQUN YUE,
DIRECTOR AND GENERAL
MANAGER

s/ F. Thomas Eck, III
F. THOMAS ECK, III,
DIRECTOR

s/ Preston Jones
PRESTON JONES,
DIRECTOR

APPENDIX C — EXCERPTS FROM DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, FILED JANUARY 26, 2005

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION**

Civil No. 2:98-CV-238J

ORIENT MINERAL COMPANY, and
WIL-BAO MINERAL CO., LTD.,

Plaintiffs,

vs.

BANK OF CHINA, DAVID YUE aka
YIAOQUN YUE, and SAREN GAOWA,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FED. R. CIV. P. 52(a)) AND ORDER RE: PENDING MOTIONS

Appendix C

FINDINGS OF FACT: THE WIL-BAO JOINT VENTURE 2

Formation of Orient Mineral and Wil-Bao ... 7

Soliciting Investment from McKee 12

Meeting at the Bank on May 27, 1996 28

Meetings in Sanmenxia on May 28, 1996 42

Meeting at the Bank on May 29, 1996 44

Disbursements from the Wil-Bao U.S. Dollar Account 46

The July 10, 1996 Jones Authorization Letter 49

The August 1, 1996 US$ 135,000 Transfer 52

The August 28, 1996 US$ 400,000 Transfer to Saren Gaowa 54

The October 17, 1996 Jones Authorization Letter 57

The October 18, 1996 US$1 Million Transfer 58

Appendix C

The December 23, 1996 Jones Authorization Letter 59

The January 23, 1997 US$ 63,250 Transfer 60

The May 8, 1997 US$ 100,000 Transfer ... 62

The Gathering Storm: Wil-Bao & Yue 62

February 1997: Wilson and Jones go to China 62

The April 23, 1997 Jones Letter 64

Yue's April 1997 Financial Report 66

The July 1997 Trip to China 70

July 8, 1997 Meeting at the Bank 72

July 1997: Discussions with Yue 75

Further Correspondence with Yue: July-October 1997 78

The October 1997 Trip to China 81

Wil-Bao & Yue After October 1997 89

Appendix C

ADDITIONAL FINDINGS OF FACT BEARING UPON PLAINTIFFS' THEORIES OF LIABILITY 91

Chinese Banking Regulations, Policies, Procedures, Practices & Reasonable Commercial Standards of Care in the Chinese Banking Industry Henan Province (ca. 1996) 91

Weight and Credibility of the Expert Testimony 111

Orient Mineral's Relationship with the Bank of China 120

The May 24th Wil-Bao Resolution & the May 27th Meeting 126

Regulatory Compliance:

SAEC Foreign Exchange Account Registration Certificates 133

Outbound Remittances from the Wil-Bao U.S. Dollar Account 137

Wil-Bao's Registered Capital and "Excess Investment Funds" 138

Additional Findings re: Plaintiffs' Tort Theories of Liability 147

Appendix C

Civil Conspiracy 150

Fraud/Misrepresentation 151

Negligent Misrepresentation 153

Negligence 155

Plaintiffs' Claims for Compensatory Damages 156

"Unauthorized Transfers" from the Wil-Bao Accounts 156

The US$ 400,000 Transfer 156

Other "Unauthorized Transfers" from the Wil-Bao Accounts 157

Plaintiffs' Theory of Consequential Damages 165

Wil-Bao & the Linshikeng Mine 166

Attempted Acquisition of the Moshiyu Mine 176

The Moshiyu Purchase & the Collapse of Wil-Bao 179

CONCLUSIONS OF LAW 180

Appendix C

Jurisdiction & the Foreign Sovereign Immunities Act 180

Breach of Contract 188

Civil Conspiracy 191

Common Law Fraud/Misrepresentation 194

Negligent Misrepresentation 196

Negligence 200

Compensatory & Consequential Damages ... 210

PENDING MOTIONS 212

Motion to Strike Plaintiffs' Exhibits 212

Motion in Limine re: Eck 214

Motion for Adverse Inference for Spoliation .. 215

Motion to Modify Final Pretrial Order 218

Motion in Limine re: Gaowa Hearsay Testimony 219

Motion in Limine re: ex parte Communications 220

Appendix C

Motion for Leave to Reopen the Evidence .. 221

Motion in Limine re: Wilson & McKee 224

Motion to Correct Trial Transcript 225

SUMMARY AND CONCLUSION 226

Appendix C

* * *

59. On May 14th (in China, the same day), Yue contacted the Bank's Ling Bao Sub-branch, stated that certain funds would be transmitted from Orient to the Bank, and requested an account number to which the funds could be wired. (Tr. 4/20/04, at 60:2-23, 86:13-88:9 (Mme. Liu).)

60. In response to Yue's request, the Bank provided a letter dated May 14, 1996, giving wire transfer routing instructions and an account number ("ORIENT MINERAL CO., Account No. 14833") to be used for the transfer and stating that the Bank would keep the funds safe pending the arrival of Orient Mineral's representative. (PX-5; PX-6; Transcript of Trial, dated April 20, 2004 ("Tr. 4/20/04"), at 61:9-62:23, 87:20-89:12 (Mme. Liu).[18])

61. On or about May 15, 1996, Jones received copies of a letter addressed to Wilson from Yue (PX-7), reciting that the bank "agreed [to] our application in temporary, special holding account for Orient Mineral Co. that has been set up by me in [the] LingBao Branch today" to receive the US$ 3 million transfer, together with the bank's May 14th letter (PX-5) and a handwritten

---

18. According to Mr. Wilson, Mme. Liu's May 14th letter "was received first by David Yue and immediately passed on to Orient Mineral," presumably referring to Wilson himself. (Transcript of Trial, dated April 15, 2004, at 117:16-23 (Mr. Wilson); *see* Tr. 4/20/04, at 62:4-5 (Mme. Liu) ("I gave [the letter] to Mr. Yue Xaioqun.").)

"interpretation" or rough translation of the letter prepared by Wilson (PX-6). (Tr. 4/7/04 p.m., at 41:14-20, 48:8-51:25 (Mr. Jones); Tr. 4/14/04, at 59:8-62:16 (Mr. Wilson).)[19]

* * *

69. On May 16, 1996, Orient Mineral's board of directors, noting that the corporation "is presently in the process of receiving approximately $3,000,000, U.S., to be deposited into the Bank of China," passed a resolution stating:

> WHEREAS, it is the desire of the Board of Directors that the disposition of said funds be controlled by one person, and
>
> WHEREAS, is a condition of the receipt of said funds that said person shall be Preston Jones, a member of the Board of Directors;
>
> NOW, THEREFORE, BE IT RESOLVED that Preston Jones shall be the sole and exclusive person to act on behalf of Orient Mineral Co. with respect to the disposition of all funds deposited in the Bank of China, Lingbao Branch of HeNan Province; and
>
> . . .
>
> BE IT FURTHER RESOLVED that the Board of Directors and Orient Mineral Co. shall hold the Bank of China harmless from

all claims or liabilities of any kind whatsoever, provided the directions of Preston Jones are followed by said Bank of China.

(PX-8; PTO at pt. III, ¶ 6; Tr. 4/14/04, at 72:19-74:3 (Mr. Wilson).)

70. This Board Resolution was a formal corporate document impressed with Orient Mineral' corporate seal on a gold foil star, signed by F. Thomas Eck, III as its President, and attested to by its acting corporate Secretary, Pauline Smith. (Tr. 4/8/04, at 176:15-179:25 (Mr. Jones); PX-8.)

71. Accompanying Orient Mineral's Board Resolution was a letter dated May 16, 1996, and also signed by Eck as Orient Mineral's President. This letter was on Orient Mineral's letterhead and bore the impression of its corporate seal. It was addressed to the Bank of China and enclosed the May 16th Board Resolution, which it characterized as authorizing Preston Jones as Orient Mineral's sole and exclusive agent to approve, direct, or otherwise designate the funds on deposit with the Bank pursuant to a wire transfer from McKee. The letter further stated that the May 16th Board Resolution was confirmed and ratified in all respects and that Preston Jones shall have full and complete authority with regard to the disposition of said funds. (PX-8; Tr. 4/7/04 p.m., at 53:16-57:15 (Mr. Jones); Tr. 4/8/04, at 180:1-182:23 (same); PTO at pt. III, ¶ 7.)

Appendix C

* * *

74. After the loan documents had been executed, Plaintiffs initiated the wire transfer of the US$ 3 million to China on May 21, 1996, through the Bank of China's branch office in New York. (PX-148, PX-149; Tr. 4/7/04 p.m., at 69:7-72:9 (Mr. Jones)).

* * *

78. Although Mr. McKee had already wired US$ 3 million before May 24, 1996, it was a condition of his investment that Wil-Bao adopt a board resolution giving Mr. Jones authority over Wil-Bao expenditures exceeding US$ 25,000. Accordingly, on May 24, 1996, the Wil-Bao board of directors held a special meeting in Mr. Wilson's hotel room in Lingbao, at which six of the seven board members were present. (Tr. 4/7/04 p.m., at 73:20-25 (Mr. Jones); Tr. 4/8/04, at 160:163:12 (same); Tr. 4/14/04, at 69:12-72:8 (Mr. Wilson).)

79. At this meeting Wil-Bao adopted a Board Resolution that provided in pertinent part:

> Be it further resolved that until said sums are repaid in full Preston Jones shall be appointed as the director of Wil Bao responsible for the management of the financial affairs of Wil Bao with the sole authority to approve any expenditure of Wil Bao in excess of $25,000 U.S. dollars.

(PX-16; PTO at pt: III, ¶ 9.)

Appendix C

80. Like the May 16th Orient Mineral resolution, this May 24th Wil-Bao Board Resolution was drafted by Mr. Eck. (Tr. 4/7/04 p.m., at 75:5-7 (Mr. Jones); Tr. 4/14/04, at 70:21-25 (Mr. Wilson).) It does not contain any reference to the Bank of China, or to the disbursement or disposition of funds in any account at the Bank; nor does it bear any of the indicia of corporate authority (such as company letterhead, corporate seal imprint, secretary's attestation, officer's cover letter) that the May 16th Orient Mineral Board Resolution bore. (*Compare* PX-16 *with* PX-8.)

* * *

88. Mr. Yue was the only person present during the meeting who could speak and understand both English and Chinese, and Yue provided all of the translation between the English speakers and Chinese speakers during the meeting. (Tr. 4/7/04 p.m., at 82:11-17, 88:8-93:23 (Mr. Jones); Tr. 4/8/04, at 174:4-15, 175:6-19, 185:4-186:7, 187:1-10 (same); Tr. 4/14/04, at 79:11-80:1 (Mr. Wilson) Tr. 4/15/04, at 16:5-18:13 (same); Transcript of Trial, dated April 21, 2004 ("Tr. 4/21/04"), at 8:2-13 (Mme. Zhou); PTO at pt. III, ¶ 14.)

89. Thus, *Mr. Yue was the only participant in the May 27, 1996 meeting who knew both what the Americans had said in English and how that was then translated into Chinese, and what the bank officers had said in Chinese, and how that was then translated into English.* (Tr. 4/8/04, at 187:1-10 (Mr. Jones); Tr. 4/15/04, at 19:4-10, 21:5-15 (Mr. Wilson).)

90. Messrs. Wilson, Jones, and Eck relied upon Mr. Yue to represent Orient Mineral's interests in speaking with the bank officers and depended upon Yue to translate accurately the statements that they made to the bank officers during the meeting. Mr. Wilson trusted Mr. Yue and had confidence that Yue was representing them properly. (Tr. 4/15/04, at 14:10-15:13, 16:5-18:9 (Mr. Wilson); Tr. 4/14/04, at 85:25-86:14 (same).)

* * *

170. The US$ 400,000 was transmitted by wire transfer and received by Zions First National Bank in Sandy, Utah, for the benefit of Ms. Saren Gaowa on September 3, 1996. (PTO at pt. III, ¶ 19.)

* * *

346. As set forth above, on or about May 14, 1996, Mr. Yue made application for an account at the Lingbao Sub-branch of the Bank of China in the name of Orient Mineral. (*See supra* Paragraph 59.)

347. On or about that same day, the Bank acknowledged receipt of Yue's application, and expressly "agree[d] to establish in our bank a temporary U.S. dollar account at the request of your honorable company (Sino-U.S. Joint Venture Henan Wil-Bao Metal Smelting Company, Ltd.)." (PX-225/PX-51PX-6.)

348. By letter of that date, Mme. Liu advised Yue of "the relevant particulars," including the name,

number and location of the account, and the statement that "[a]fter the funds are transferred, our bank will be responsible for safekeeping these funds." (PX-225/PX-5/PX-6; *see* Tr. 4/12/04, at 25:6-7 (Mme. Liu) ("In the letter it stated that if the funds were to be transferred in then the bank would safe keep the funds.").) Further, she requested that Mr. Yue bring into the bank the "business charter" or license, the company stamp, and a company authorization letter so that the funds "can be used in the joint venture in accord with arrangements made by the representative of the American party." (*Id.*)

349. Through Mr. Yue and then Mr. Wilson, Orient Mineral received Mme. Liu's May 14th letter (PX-5), and gained at least a rudimentary grasp of its contents through Yue's explanation and Wilson's rough draft translation of its text (PX-6). (Tr. account as a "temporary" account, that is, "an account really held by the bank, maintained in the bank . . . until the customer decides what to do with the funds." (Tr. 4/15 04, at 197:18-198:9, 203:3-20 (Mr. Harner); PX-5; PX-235.)

* * *

363. The terms of the contract between Orient Mineral and the Bank of China, formed in Lingbao, China, include the Bank's promise to receive and keep safe Orient Mineral's funds when wired to the Bank, awaiting further instructions by Orient Mineral's designated representative; and Orient Mineral's performance in (*i*) wiring US$ million to the Bank's

Lingbao Sub-branch; *(ii)* designating Preston Jones as Orient Mineral's representative with authority to dispose of those funds; and *(iii)* its offer to hold the Bank harmless "provided the directions of Preston Jones are followed by said Bank of China," as those terms are reflected in Mme. Liu's May 14th letter as it was understood at that time by the directors of Orient Mineral as well as Orient Mineral's May 16th board resolution and cover letter (PX-8), first presented to the Bank at the May 27, 1996 meeting.

364. The Bank remitted the entire balance of the Orient Mineral wire transfer as directed by Preston Jones, evidenced *inter alia*, by the transfer slip signed by Jones on May 27, 1996 (BCX-15), and the corresponding receipt (PX-111).

365. None of the documents submitted to the Bank by Orient Mineral made any reference to a US$ 25,000 limitation on any account. (*See* Tr. 4/23/04, at 132:4-15 (Mr. Ludwig); Transcript of Hearing, dated June 18, 2004, at 69:10-70:14 (same).)

366. The contract between Orient Mineral and the Bank of China did not encompass any agreement as to a US$ 25,000 limitation or any other terms and conditions of any account to be opened for the Wil-Bao joint venture, or any other entity, unit or individual.

Appendix C

The May 24th Wil-Bao Resolution & the May 27th Meeting

367. Mr. Jones testified that at the May 27th meeting, he said that "as special director of Wil-Bao," he "was to have the authority to control . . . the expenditures in excess of $25,000" from the Wil-Bao U.S. dollar account (no. 148250070008), based upon the May 24th Wil-Bao board resolution (PX-16). (Tr. 4/8/04, at 6:19-7:20 (Mr. Jones).)

368. Mr. Jones testified at trial that the May 24th Wil-Bao board resolution was provided to the Bank during the May 27, 1996 meeting, but he earlier submitted a declaration to the court in which he stated that he was unsure whether the May 24th resolution was provided during the May 27 or the May 29 meeting (*See* Declaration of Preston Jones, dated April 8, 2002, at ¶ annexed as Exhibit 1 to Plaintiffs' Opposition to Defendant Bank of China's Renewed Motion for Judgment on the Pleadings, filed April 9, 2002 (dkt. no. 105); Tr. 4/9/04, at 35:7-37:5 (Mr. Jones).)

369. Mr. Jones testified that Mr. Wang handed the resolution to Mme. Liu, who reviewed the Chinese version and then handed it to Mme. Zhou, who left the room with it. (Tr. 4/8/04, at 208:4-23 (Mr. Jones).)

370. Mme. Liu, on the other hand, testified that she did *not* see the May 24th Wil-Bao resolution at the May 27th meeting. (Tr. 4/12/04, at 56:19-57:8 (Mme. Liu)) Both Mr. Wang and Mme. Zhou testified that they did not

see the document at the May 27th meeting, or at any time prior to this litigation. (*Id.* at 85:16-21, 104:7-17 (Mr. Wang); Tr. 4/19/04, at 129:4-18, 136:22-13.7:3 (same); Tr. 4/21/04, at 14:16-15:4 (Mme. Zhou).)

371. Messrs. Wilson and Eck had also submitted prior declarations in which they both stated that they were uncertain whether the Wil-Bao resolution was provided to the Bank on May 27 or May 29, 1996. (Exhibits 2 & 3 to Plaintiffs' Opposition to Defendant Bank of China's Renewed Motion for Judgment on the Pleadings, filed April 9, 2002 (dkt. no. 105).)

372. Mr. Wilson testified at trial that Mr. Jones asked Mr. Eck "to hand Mr. Wang that resolution both in Chinese and in English. And so he just kind of looked at the papers and just set them down," but that this occurred at the *May 29th* meeting with the bank. (Tr. 4/14/04, at 86:19-22; *id.* at 87:5-14; Tr. 4/15/04, at 23:1-24:1 (same)).)

> Q. I think you talked yesterday about a meeting on May 29th of 1996, and that was again at the Bank of China, Lingbao Branch. Do you remember that?
>
> A. I do.
>
> Q. That was pretty short, correct?
>
> A. Relatively short, correct.

Q. That is where Exhibit 23 was presented to the bank in your memory?

A. That is right. There was another one as well that I gave. I didn't give it but it was given.

Q. What was the other one?

A. That was the one where it showed that Mr. Jones had been authorized by the Wil-Bao board to have control over the dollar account of any expenditures over $25,000.

Q. I am going to show the witness Exhibit 16, Plaintiff's Exhibit 16. Is that the document that you are talking about?

A. Yes, this is the document.

Q. It is your recollection that that was handed over to Mr. Wang at the May 29th meeting?

A. I remember it specifically.

Q. I think you said that when it was handed to Mr. Wang he just put it down on his desk?

A. That is right. He received it and just put it on his desk.

(Tr. 4/15/04, at 23:1-24:1 (Mr. Wilson).)[134] At this same meeting, the note authorizing US$ 1.215 million in expenditures by Yue (PX-23) was written by Mr. Wilson at Jones' direction and handed by Mr. Eck to Mr. Wang as well.

373. To Jones, the Wil-Bao resolution served as the predicate for his written authorization to Yue to remit forty percent (40%) of the McKee loan proceeds on the designated expenditures, and it stands to reason that both documents would have been presented together.

374. No witness testified to any specific discussion of the May 24th Wil-Bao board resolution (PX-16) with the bank officers present at the May 27, 1996 meeting; nor did the bank officers obtain a separate "in-house" Chinese translation of the Wil-Bao resolution during that meeting, as they had with the Orient Mineral resolution and cover letter (PX-8).[135]

375. More likely than not, the May 24th Wil-Bao board resolution (PX-16) was presented to Mr. Wang at the May *29th* meeting at the Lingbao Sub-branch of the Bank of China, as Mr. Wilson testified, together with the handwritten note penned by Wilson and signed by Jones and Yue, authorizing US$ 1,215,000 in expenditures by Yue (PX-23).

---

134. Without explanation, Wilson subsequently altered his testimony as to sequence upon redirect examination by Plaintiffs' counsel. *(See* Tr. 4/15/04, at 114:17-20 ("Q. When was that given to Mr. Wang, at the meeting May 27th or May 29th? A. It was handed to him on the May 27th.").)

Appendix C

376. Apart from its presentation to Mr. Wang on May 29th, the May 24, 1996 Wil-Bao board resolution (PX-16) does not make any reference to the Wil-Bao bank accounts or to any limitation on transactions in the Wil-Bao bank accounts, and does not contain any requirement that the bank contact Jones in the United States concerning transactions in Wil-Bao accounts.[136]

---

136. Plaintiffs concede that the Wil-Bao resolution "was not intended to be addressed to the Bank," and argue "that it was merely given to the Bank as an additional means of ensuring that they understood Jones' instructions." (Plaintiffs' Response to Bank of China's Proposed Findings of Fact and Conclusions of Law, filed June 25, 2004 (dkt. no. 325), at 12-13; Transcript of Hearing, dated June 18, 2004, at 64:20-65:2 (Mr. Ludwig).) The source of Jones' authority to give instructions to the Bank concerning Wil-Bao accounts remains unclear.

The resolution has the appearance of an internal control on "expenditures" by the company more than a restriction on a specific bank account; *e.g.*, Jones' approval authority terminates when Mr. McKee was fully repaid—necessarily an internal Wil-Bao matter, and an event of which the Bank would-likely be unaware. (PX-16; *see* (Tr. 4/8/04, at 165:3-166:12 (Mr. Jones).) On cross-examination, Mr. Jones conceded that he knew that there was a difference between an "expenditure" and a withdrawal from a bank account. (Tr. 4/8/04, at 166:25-172:1 (Mr. Jones).) Accordingly, the Wil-Bao resolution may fairly be read to be concerned with the management of the financial affairs of Wil-Bao and not the power to control Wil-Bao's account with the Bank. (PX-l6; *but cf.* Tr. 4/15/04, at 69:11-72:9 (Mr. Wilson) (Wilson anticipated that Bank "would have some responsibility to recognize that any large disbursements" were under Jones' control).)

Appendix C

377. Plaintiffs' banking expert, Stephen M. Hamer, testified that Chinese banks do not require a board resolution when opening an account. (Transcript of Trial, dated April 16, 2004 ("Tr. 4/16/04"), at 20:2-11.)

* * *

380. No one from Wil-Bao brought to the May 27th meeting any document addressed to the Bank of China sealed with the Wil-Bao company seal directing the Bank of China to put any limitation on the Wil-Bao accounts or requiring Jones's personal authorization for any withdrawal or disbursement from the Wil-Bao accounts exceeding US$ 25,000. (Tr. 4/15/04, at 69:11-72:16 (Mr. Wilson).)

381. Nothing in the Wil-Bao account documentation created at the May 27th meeting referred to any authority of Mr. Jones as a director of Wil-Bao over transfers or disbursements from the Wil-Bao U.S. dollar account exceeding US$ 25,000, or limiting the authority of those whose "chop" seals did appear on the account imprint card, Mr. Yue and Mr. Zhang. (Tr. 4/19/04, at 130:12-131:5, 132:1-10 (Mr. Wang).)

* * *

385. The May 24th Wil-Bao board resolution was not part of the colloquy concerning the opening of the Wil-Bao accounts on May 27, 1996, and its terms did not become part of the agreement between Wil-Bao and the Bank of China concerning the management of those accounts.

386. The agreement between Wil-Bao and the Bank of China concerning the Wil-Bao accounts did not include any limitation on remittances from the Wil-Bao U.S. dollar account apart from the requirement that transactional documents (*e.g.*, transfer/remittance slips, cash checks) bear authorizing seal imprints matching the three imprints on the specimen card prepared at the May 27th meeting (BCX-11). No additional limitations or restrictions were endorsed on the account cards.

387. The agreement between Wil-Bao and the Bank of China concerning the Wil-Bao accounts did not require the prior approval of Preston Jones for every remittance, transfer or expenditure of $25,000 or more from the Wil-Bao U.S. dollar account, or the Wil-Bao RMB account.[138]

* * *

CONCLUSIONS OF LAW

* * *

Breach of Contract

15. It is a well-recognized principle that, "A condition precedent to the enforcement of any contract is that there be a *meeting of the minds* of the parties, which must be spelled out, either expressly or implicitly, with sufficient definiteness to be enforced." *Pingree v. Continental Group of Utah, Inc.*, 558 P.2d 1317, 1321 (Utah 1976) (emphasis added & citation omitted).

Appendix C

16. The contract between Orient Mineral and the Bank of China was formed by the conduct of Orient Mineral in (*i*) wiring US$ 3 million to the Lingbao Sub-branch, (*ii*) designating Preston Jones as Orient Mineral's sole representative with authority to dispose of those funds, and (*iii*) promising to hold the Bank harmless if Jones' instructions are followed (PX-8), in consideration for the Bank's promise to receive and safeguard those funds, so that the funds can be used in the joint venture in accord with arrangements to be made by Orient Mineral's designated representative, as set forth in Mme. Liu's letter of May 14, 1996 (PX-5).

17. The Bank of China performed its promise to receive and safeguard the Orient Mineral funds (US$ 2,999,990), awaiting the instructions of Orient Mineral's designated representative, Preston Jones.

18. The Bank of China proceeded to follow Jones' instructions to transfer the Orient Mineral funds into Wil-Bao's U.S. dollar account, performing its promise as set forth in the May 14th letter, to the extent that Jones' instructions were in fact communicated to the Bank.

19. To the extent that Mr. Jones' directions were not fully communicated to the Bank, that failure to communicate is attributed to the conduct of Orient Mineral's shareholder and director, Mr. Yue, who Mr. Jones understood to be acting on behalf of Orient Mineral in translating Jones' directions to the Bank.

20. The Bank of China did not breach its contract with Orient Mineral.

21. The terms governing the Wil-Bao accounts opened at the Lingbao Sub-branch of the Bank of China were those mutually assented to by the Bank and its customer, the Wil-Bao joint venture, and spelled out, either expressly or implicitly, with sufficient definiteness to be enforced.[195]

---

195. Plaintiffs' counsel now insists that Jones' authority to direct the disposition of Orient Mineral's funds extended to the authority to direct the terms governing the *Wil-Bao* accounts, specifically "to establish a $25,000 restricted Wil-Bao USD account, in all cases subject to his approval and control." (Second Amended Complaint at 14 ¶¶ 57-59.) According to counsel, Jones' instruction—to be followed by the Bank under its agreement with Orient Mineral—"really was, on behalf of *Orient*, was to set up a *Wil-Bao* U.S. dollar account with a $25,000 restriction" on disbursements. (Transcript of Hearing, dated June 18, 2004, at 24:12-14 (Mr. Ludwig) (emphasis added).) At the same time, according to counsel, "It was his instruction, wearing now his other hat, and he was a special director for both plaintiffs, to set up the same dollar restricted account into which the investment account of Wil-Bao would reside subject to Jones' authority." (*Id.* at 24:16-19; *see id.* at 30:11-15, 48:8-10 ("and wearing an Orient hat and wearing a Wil-Bao hat, set up the Wil-Bao U.S. dollar account with the $25,000 restriction that I can control"); *see* Tr. 4/8/04, at 4:11-7:19 (Mr. Jones) (Jones' two hats discussed).)

Counsel's haberdashery cannot gloss over the authority issue: nothing in the Orient Mineral board resolution or cover letter (PX-8) says that Jones was empowered to speak for

(Cont'd)

22. There was no mutual assent to any terms that were not in fact communicated to the Bank by Wil-Bao either in writing or through Wil-Bao's director and general manager, Mr. Yue at the time that the Wil-Bao accounts were opened by the Bank.

23. The terms of the contract between the Bank and Wil-Bao did not include any limitation on withdrawals, transfers or remittances that were not set forth on the "chop" seal specimen cards that were created at the May 27, 1996 meeting.

24. No requirement that Mr. Jones authorize any expenditure in excess of US$ 25,000 from the Wil-Bao U.S. dollar account (or the Wil-Bao RMB account) was endorsed on the account specimen cards or otherwise made a term of the contract between Wil-Bao and the Bank.

25. The Bank of China did not breach its contract with Wil-Bao concerning the Wil-Bao accounts by processing transfers or remittances in excess of US$ 25,000 when requested by Wil-Bao,[196] as evidenced by

---

(Cont'd)

Wil-Bao in opening Wil-Bao's accounts or disposing of Wil-Bao's funds. (*Cf.* Transcript of Hearing, dated June 18, 2004, at 69:10-70:14 (Mr. Ludwig).)

196. This could only be a breach of contract if the Bank had opened the "$25,000 restricted Wil-Bao USD account" that the Plaintiffs now allege the Bank failed to establish. (Second Amended Complaint, at 14-15 ¶ 59.)

the three required "chop" seal imprints, in particular, the wire transfer of US$ 400,000 on or about August 28, 1996 to Zions First National Bank in Sandy, Utah for remittance to Saren Gaowa.

* * * *

APPENDIX D — AMENDED COUNTERCLAIM DATED MARCH 19, 2008

Christopher Brady, *pro hac vice*
Orlee Goldfeld, *pro hac vice*
BUTZEL LONG, a professional corporation
380 Madison Avenue, 22nd Floor
New York, New York 10017
Telephone: (212) 818-1110

Arthur B. Berger (6490)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
Salt Lake City, Utah 84111
Telephone: (801) 532-1500

Attorneys for Defendant/Counterclaim Plaintiff Bank of China

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Civil No. 2:98-CV-238J
Judge Bruce S. Jenkins

ORIENT MINERAL COMPANY and WIL-BAO MINERAL CO. LTD.

Plaintiffs,

v.

BANK OF CHINA, DAVID YUE a/k/a YUE YIAOQUN, and SAREN GAOWA, and DOES 1-30

Defendants.

Appendix D

BANK OF CHINA,

Counterclaim-Plaintiff,

v.

ORIENT MINERAL COMPANY, F. THOMAS ECK, III, ART WILSON, PRESTON JONES, and R. ELLSWORTH McKEE,

Counterclaim-Defendants.

AMENDED COUNTERCLAIM FOR INDEMNIFICATION

1. Counterclaim-Plaintiff, the Bank, is a corporation organized and existing under the laws of the People's Republic of China and was owned by the government of that country. The Bank's principal office is in Beijing. At the time this action was filed, the Bank was a "foreign state" within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602 through 1611 ("FSIA").

2. Counterclaim-Defendant Orient is a corporation duly formed and organized under the laws of the State of Nevada with its principal place of business in Nevada.

3. Counterclaim-Defendant F. Thomas Eck, III, is a United States citizen and a resident of Nevada and/or California and was a member of the Board of Directors

of Orient at the time the May 16, 1996 Letter and Board Resolution were prepared and presented to the Bank.

4. Counterclaim-Defendant Art Wilson is a United States citizen and a resident of Nevada and was a member of the Board of Directors of Orient at the time the May 16, 1996 Letter and Board Resolution were prepared and presented to the Bank.

5. Counterclaim-Defendant Preston M. Jones is a United States citizen and a resident of Tennessee and was a member of the Board of Directors of Orient at the time the May 16, 1996 Letter and Board Resolution were prepared and presented to the Bank.

6. Counterclaim-Defendant R. Ellsworth McKee is a United States citizen and a resident of Tennessee and was the real party in interest behind and an alter ego of Orient, as well as the principal of Counterclaim-Defendant Preston Jones, who acted at all times as the agent of Counterclaim-Defendant McKee.

7. Jurisdiction in this district is predicated on 28 U.S.C. § 1332(a)(4).

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a).

FACTUAL BACKGROUND

9. On the morning of May 27, 1996, the Ling Bao Sub-Branch of the Bank received from McKee via cable

a funds transfer of $2,999,990.00. This transfer of McKee's funds was made by or at the direction of McKee and consisted of funds advanced by McKee to or on behalf of Orient. At the time of the transfer, McKee was, and on information and belief still is, the direct or beneficial owner of at least 87% of the authorized stock of Orient and 100% of the issued stock of Orient.

10. Later on the morning of May 27, 1996, David Yue, Eck, Wilson, Jones, and others came to the Bank's Ling Bao Sub-Branch and met with officers of the Ling Bao Sub-Branch.

11. David Yue and the others, purporting to act on behalf of Orient, Wil-Bao, their Boards of Directors, and/or R. Ellsworth McKee, provided to the Bank's Ling Bao Sub-Branch officers the May 16, 1996 Letter and Board Resolution, in which Orient and its Board of Directors (including Eck, Wilson, and Jones), authorized Preston Jones, acting as McKee's agent and representative, to dispose of the McKee funds. In addition, Orient and its Directors, including Wilson, Eck, and Jones as McKee's agent and representative, agreed to indemnify and hold the Bank harmless from any claims and liabilities "of any sort whatsoever" resulting from the Bank's compliance with the transfer directions of Preston Jones.

12. During the same meeting with the Ling Bao Sub-Branch, Preston Jones signed a written transfer slip instructing the Bank's Ling Bao Sub-Branch to

transfer the entire balance of McKee's funds of $2,999,990.00 to the account of Wil-Bao.

13. In order to identify himself, Preston Jones produced and displayed to the Bank's Ling Bao Sub-Branch officers his U.S. Passport and subscribed his Passport Number upon the transfer slip.

14. Relying upon the May 16, 1996 Letter and Board Resolution, as well as the transfer slip signed by Preston Jones, the Ling Bao Sub-Branch did on that same day (Monday, May 27, 1996) transfer McKee's funds to the account of Wil-Bao, as directed by Preston Jones based upon his actual and/or apparent authority to act on behalf of Orient and McKee.

15. Thereafter, the Bank handled transactions in China for the accounts of Wil-Bao, including the $400,000 wire transfer in August 1996 to Saren Gaowa in Utah, in accordance with the laws and customary banking practices of China.

16. Despite the foregoing, Orient, with the co-operation and support of Wilson, Eck, and Jones, and funded by McKee, commenced and for nearly ten years have prosecuted this action against the Bank.

17. From both the transactional documents entered into in connection with McKee's investment in Orient and the Wil-Bao project and also from McKee's requirement that his agent and representative Preston Jones have complete control of the disposition of

McKee's $3 million investment funds and approval authority for any major expenditures (*i.e.*, over $25,000) of the Wil-Bao project, it is apparent that Orient was influenced and governed by McKee, directly and indirectly, throughout the Wil-Bao project.

18. In addition, McKee's interests and Orient's interests were inseparable. Orient's interest in pursuing its claims against the Bank in this action were and are for the purpose of repaying McKee, who is the beneficial owner of 100% of Orient's issued stock.

19. Finally, in light of the fact that Orient has few, if any, assets and that McKee is the real party in interest behind Orient, allowing McKee to hide behind the fiction of Orient's independent corporate existence would effectively deprive the Bank of the indemnification that it was promised and that it relied upon. Such a result would sanction the fraudulent nature of the indemnification promise made Orient and its Directors to the Bank and would promote injustice by allowing Orient, its Directors, and McKee to utilize this Court and the U.S. judicial system to damage the Bank with impunity.

20. Based upon the facts of and record in this case, McKee, as Orient's alter ego, must be held accountable for Orient's indemnification of the Bank.

21. In addition, the facts and record in this case show that, at all times, Preston Jones acted as the agent and representative of his disclosed principal,

R. Ellsworth McKee. In that role, Jones had actual and apparent authority to act on behalf of McKee, including: acting as a Director of Orient to indemnify the Bank if it followed Jones's directions; participating in the presentation to the Bank of the Orient Board Resolution containing the indemnification upon which the Bank relied; directing the Bank as to the disposition of the McKee funds; supervising the expenditures of Wil-Bao; demanding that payments be made to McKee from the Wil-Bao project; inspecting the books and records of Wil-Bao; and continually acting for and protecting McKee's interests and investment.

22. Accordingly, McKee is liable to the Bank for the effect of the actions of his agent, Preston Jones, separate and apart from his liability as Orient's alter ego.

23. Despite the fact that the Bank followed the directions of Preston Jones with respect to the disposition of the McKee funds, the Bank has been subjected to claims and liabilities in this action. These claims include claims by Orient and Wil-Bao, and these liabilities include liabilities of the Bank for its costs of defense, including its attorneys' fees and litigation expenses herein.

24. Accordingly, pursuant to their indemnification, Orient, its Directors, and McKee must be held accountable to hold the Bank harmless from these claims and liabilities and must repay the Bank for its costs of defense, including attorneys' fees and litigation expenses, which to date are in excess of $900,000.

Appendix D

WHEREFORE, Defendant and Counterclaim Plaintiff Bank of China demands Judgment as follows:

A. That Orient Mineral Company, F. Thomas Eck, III, Art Wilson, Preston M. Jones, and R. Ellsworth McKee be held jointly and severally liable to the Bank for its costs of defense in this action; and

B. That the Court grant the Bank such other and further relief as this Court may deem just and proper.

Dated: March 19, 2008

RAY QUINNEY & NEBEKER P.C.

s/ Arthur B. Berger
Arthur B. Berger

Christopher Brady, *pro hac vice*
Orlee Goldfeld, *pro hac vice*
BUTZEL LONG, a professional corporation

Appendix D

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2008, I filed the foregoing **AMENDED COUNTERCLAIM FOR INDEMNIFICATION** with the Clerk of the Court and mailed a copy of the foregoing, first-class postage prepaid, to the following:

Robert W. Ludwig, Jr.
Phillip R. Robinson
LUDWIG & ROBINSON
818 Conneticut Avenue, N.W., Suite 750
Washington, D.C. 20006-2722
Email: rludwig@ludwigrobinson.com

Allan O. Walsh
MCKAY, BURTON & THURMAN
170 South Main Street #800
Salt Lake City, Utah 84101
Email: allan@mbt-law.com

s/ Lori McGee

APPENDIX E — ORIENT MINERAL COMPANY'S MOTION TO DISMISS AMENDED COUNTERCLAIM FILED APRIL 2, 2008

Allan O. Walsh, Esq. (6149)
McKAY, BURTON & THURMAN
170 South Main Street, Suite 800
Salt Lake City, UT 84101
Telephone: (801) 521-4135

Robert W. Ludwig, Jr., Esq., *pro hac vice*
LUDWIG & ROBINSON, P.L.L.C.
818 Connecticut Avenue, N.W., Suite 750
Washington, D.C. 20006
Telephone: (202) 289-1800

Attorneys for Plaintiff/Counterclaim-Defendant

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Case No. 2:98CV00238J

Judge Bruce S. Jenkins

ORIENT MINERAL COMPANY, *et al.*,

Plaintiffs/Counterclaim-Defendants,

v.

BANK OF CHINA, *et al.*

Defendant/Counterclaim-Plaintiff.

Appendix E

COUNTERCLAIM-DEFENDANT ORIENT MINERAL COMPANY'S MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff/Counterclaim-Defendant Orient Mineral Company ("Orient"), by counsel, for the reasons more fully set forth in the attached Memorandum of Law, hereby move this Court to dismiss Defendant/Counterclaim-Plaintiff Bank of China's Amended Counterclaim for Indemnification, for failure to state a claim upon which relief can be granted to the Bank. Further, pursuant to Utah Code Ann. § 78-27-56, Orient requests its reasonable attorneys' fees and expenses incurred in defending a counterclaim that is without merit and not brought in good faith.

Dated: April 2, 2008

Respectfully submitted,

s/ Allan O. Walsh
Allan O. Walsh (6149)
McKAY, BURTON & THURMAN
170 South Main Street, Suite 800
Salt Lake City, UT 84101
Telephone: (801) 521-4135

Robert W. Ludwig, Jr., *pro hac vice*
LUDWIG & ROBINSON, P.L.L.C.
818 Connecticut Avenue, N.W., Ste. 750
Washington, D.C. 20006
Telephone: (202) 289-1800

Attorneys for Plaintiff/Counterclaim-Defendant
ORIENT MINERAL COMPANY

APPENDIX F — INDIVIDUAL COUNTERCLAIM DEFENDANTS' MOTION TO DISMISS AMENDED COUNTERCLAIM, FILED APRIL 16, 2008

Allan O. Walsh, Esq. (6149)
McKAY, BURTON & THURMAN
170 South Main Street, Suite 800
Salt Lake City, UT 84101
Telephone: (801) 521-4135

Robert W. Ludwig, Jr., Esq., *pro hac vice*
LUDWIG & ROBINSON, P.L.L.C.
818 Connecticut Avenue, N.W., Suite 750
Washington, D.C. 20006
Telephone: (202) 289-1800

Attorneys for Plaintiff/Counterclaim-Defendant

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Case No. 2:98CV00238J

Judge Bruce S. Jenkins

ORIENT MINERAL COMPANY, *et al.*,

Plaintiffs/Counterclaim-Defendants,

v.

BANK OF CHINA, *et al.*

Defendant/Counterclaim-Plaintiff.

Appendix F

THE INDIVIDUAL COUNTERCLAIM-DEFENDANTS' MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(2) and (b)(6), Counterclaim-Defendants Art Wilson ("Wilson"), Preston Jones ("Jones"), and R. Ellsworth McKee ("McKee") (jointly the "Individual Defendants"), by counsel, for the reasons more fully set forth in the attached Memorandum of Law, hereby move this Court to dismiss Defendant/Counterclaim-Plaintiff Bank of China's Amended Counterclaim for Indemnification, for lack of personal jurisdiction, and for failure to state a claim upon which relief can be granted to the Bank. Further, pursuant to Utah Code Ann. § 78-27-56, the Individual Defendants request their reasonable attorneys' fees and expenses incurred in defending a counterclaim that is without merit and not brought in good faith.

Dated: April 16, 2008

Respectfully submitted,

s/ Robert W. Ludwig, Jr.

Allan O. Walsh (6149)
McKAY, BURTON & THURMAN
170 South Main Street, Suite 800
Salt Lake City, UT 84101
Telephone: (801) 521-4135

Appendix F

Robert W. Ludwig, Jr., *pro hac vice*
LUDWIG & ROBINSON, P.L.L.C.
818 Connecticut Avenue, N.W., Ste. 750
Washington, D.C. 20006
Telephone: (202) 289-1800

Attorneys for Counterclaim-Defendants
Art Wilson, Preston Jones, and
R. Ellsworth McKee

Appendix F

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2008, I caused a copy of the foregoing, with the supporting Memorandum of Law, to be filed electronically with the Court and served via ecf email upon the following:

Arthur Berger, Esq.
RAY, QUINNEY & NEBEKER
79 South Main St.
P.O. Box 45385
Salt Lake City, UT 84145-0385

Christopher Brady, Esq.
HOLLYER, BRADY, SMITH, & HINES, LLP
551 Fifth Ave
New York, NY 10176-2701

/S/ Robert W. Ludwig, Jr.
Ludwig & Robinson, PLLC
818 Connecticut Ave., N.W.
Suite 750
Washington, D.C. 20006